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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 17-IB23

July 14, 2017

VIA U.S. MAIL & EMAIL

Shannon Marvel
201 N Margaret St.
Georgetown, DE 19947
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RE: February 9, 2017 and March 21, 2017 FOIA Petitions Regarding the Division of Public Health

Dear Ms. Marvel:

The Delaware Department of Justice (“DOJ”) received your letters, dated February 9, 2017 and March 21, 2017, respectively, seeking a determination as to whether the Delaware Division of Public Health (“DPH”) violated the public records provisions of Delaware’s Freedom of Information Act, 29 *Del. C.* §§10001-10006 (“FOIA”). I treat each correspondence as a separate petition for a determination pursuant to 29 *Del. C.* §10005. We invited DPH to submit a written response to the petitions. We received DPH’s response to the February 9, 2017 petition on February 17, 2017 (“February 17 Response Letter”) and its response to the March 21, 2017 petition on March 31, 2017 (“March 31 Response Letter”). I have reviewed both petitions, the response letters, a third-party submission received on February 23, 2017 regarding the February 9, 2017 petition,¹ and all supplemental correspondence. For the reasons set forth below, I conclude that DPH did not violate FOIA as alleged in the petitions.

BACKGROUND

On November 23, 2016, the DPH Office of Animal Welfare (“OAW”) seized multiple dogs from a property in Georgetown, Delaware pursuant to its statutory authority as provided in 16 *Del. C.* §3035F.²

¹ We note that DPH objected to the inclusion of the third-party submission as part of the record.

² This statute provides, in pertinent part: “Any trained and certified animal welfare officer working for the Office of Animal Welfare or the Department of Agriculture, or any law-enforcement officer as defined in §222 of Title 11, may, in instances of alleged acts of animal cruelty and as provided for by the

OAW has a sheltering contract with the Brandywine Valley SPCA (“BVSPCA”), a non-profit agency that houses stray animals, including those rescued, seized or impounded by OAW.³ Pursuant to that contract, the dogs seized from the Georgetown property were transported to BVSPCA and housed there, remaining under the control of OAW, and by extension, DPH, until December 8, 2016, when the owner of the dogs signed ownership of the dogs over to BVSPCA.⁴ The owner of the dogs is currently pending criminal trial in Sussex County on multiple counts of felony animal cruelty.⁵

February 9, 2017 Petition

On February 2, 2017, you sent a FOIA request to DPH for “any documents relating to the location of the any of the dogs seized from Deep Brand Rd. [sic] in Georgetown in November 2016. Specifically, where each dog is located currently and whether or not they are alive, and the dates of transfers to facilities following their seizure.”

On February 3, 2017, DPH’s FOIA Coordinator informed you that DPH had no records responsive to your request because the animals’ owner had transferred ownership of the animals to BVSPCA.⁶ She noted that DPH had reached out to BVSPCA after receiving your request and BVSPCA had informed DPH that none of the dogs seized during the incident were euthanized and “all ha[d] either been adopted, placed with a rescue, or [we]re still in [BVSPCA] care.”⁷ That same day, after being contacted by DPH, a BVSPCA representative sent you an email providing certain details about the current location of the dogs in question, some of which had been adopted, some of which were in foster homes, and some which were placed with other shelters or rescue partners.⁸ BVSPCA also stated: “As far as the names and locations of the rescues, we do not give out proprietary and/or confidential information regarding our adopters and partners.”⁹ BVSPCA concluded by stating: “I can assure you that none of the dogs from

laws of Delaware relating to seizure of property, impound in an appropriate shelter, animal rescue or, if required, in an appropriate veterinarian facility, any animal subjected to cruel mistreatment or cruel neglect.”

³ The contract attached to the February 9, 2017 petition references “Chester County Animal Control.” Based on the parties’ submissions, and for purposes of this determination only, I assume that BVSPCA and Chester County animal control are the same entity.

⁴ In its February 17, 2017 response, DPH stated that the seized animals were in DPH’s control up until the date that ownership was signed over to BVSPCA, at which point they became the property of BVSPCA.

⁵ February 17 Response Letter at 3.

⁶ Email from A. Wojcik to S. Marvel dated February 3, 2017.

⁷ *Id.*

⁸ February 17 Response Letter at Appendix A.

⁹ *Id.*

this case have been euthanized or are at risk of euthanasia.”¹⁰ BVSPCA also included a spreadsheet containing certain placement information, as well as photographs of some of the dogs.¹¹ On February 3, 2017, you sent an email to DPH’s FOIA Coordinator stating: “As the organization contracted the [sic] DHSS to handle a state service, BVSPCA is required by FOIA to give the location of the dogs.”¹² Hours later, DPH’s FOIA Coordinator responded by citing 29 *Del. C.* §10003(j)(1) regarding public body’s obligation with regards to noncustodial records controlled by a public body and clarified that any responsive records were not in DPH’s possession, control or authority.¹³ You then asked whether DPH had asked BVSPCA for the records and BVSPCA declined to provide the information.¹⁴ She responded:

No, it means that once ownership of the animals was signed over to them, the records are no longer in our control.

If the records are not under our control, we cannot provide them. The records are under the control of BVSPCA and can only be provided by BVSPCA. Our contract does not impact this. You should request the records from BVSPCA.

As we indicated in our initial response, we are confident that the animals are safe. Additionally, I understand BVSPCA has posted an update on the status of the animals on their Facebook page.¹⁵

You replied by citing 29 *Del. C.* §10003(j)(1) and stating: “This states that you must (promptly) request that they provide them. If you cannot provide them, logic would suggest that they refused to provide them to you.”¹⁶ DPH’s FOIA Coordinator responded:

None of the records related to their location are in our control. Not just not in our possession. We do not have the legal authority to force a private business to turn over records that are not ours. We have met our legal requirement in response to this FOIA.

¹⁰ *Id.*

¹¹ *See id.*

¹² Email from S. Marvel to A. Wojcik dated February 3, 2017 (2:22 PM).

¹³ Email from A. Wojcik dated February 3, 2017 (4:12 PM).

¹⁴ Email from S. Marvel to A. Wojcik dated February 3, 2017 (4:15 PM).

¹⁵ Email from A. Wojcik to S. Marvel dated February 3, 2017 (4:26 PM).

¹⁶ Email from S. Marvel to A. Wojcik dated February 3, 2017 (4:30 PM).

Though we are in constant contact with them anyway [sic] have made direct contact with BVSPCA about this FOIA in the last 24-hours. We are confident that the dogs are safe and well placed.

Given that we have no legal authority over these records, it is up to BVSPCA to determine whether they want to provide the address of private individual's homes, or those of the rescues/shelters where the dogs have been placed.

We partnered with Brandywine because of their commitment to animals, and we are particularly grateful for their care of these 14 dogs.

I hope this information is helpful. Have a good weekend.¹⁷

You replied:

Let me rephrase this, as I was apparently not clear the first time.

The FOIA states that you are REQUIRED BY LAW to request these documents of them. If you refuse to answer whether or not you did in fact request them and if they complied or not, i [sic] will be forced to print that and the organization I work for may pursue legal options.

Did your agency or did your agency not request the location of the dogs in question from the BVSPCA? If you did not, please explain your interpretation of the FOIA that would make that legal. If you did, you are required by law to turn the information over to the public.¹⁸

On February 7, 2017, DPH's FOIA Coordinator informed you that OAW did not request the records because they are not in DPH or OAW's control and have not been since early December.¹⁹ She provided the contact information for this office and informed you that you were free to file a petition with this office if you disagreed with DPH's position.²⁰ She then noted that DPH considered your request closed.²¹

¹⁷ Email from A. Wojcik to S. Marvel dated February 3, 2017 (5:03 PM).

¹⁸ Email from S. Marvel to A. Wojcik dated February 3, 2017 (5:20 PM).

¹⁹ Email from A. Wojcik to S. Marvel dated February 7, 2017 (9:28 PM).

²⁰ *Id.*

²¹ *Id.*

March 21, 2017 Petition

On February 1, 2017, you sent a FOIA request to DPH for “[m]edical records of all dogs seized on Nov. 23, 24, or 26 of 2016” from a specific property. DPH’s FOIA Coordinator acknowledged receipt of your request that same day.²² On February 20, 2017, she informed you that DPH required additional time to fulfill your request “due to legal review.”²³ She stated that, per 29 *Del. C.* §10003(h)(1), she was required to provide a good faith estimate of how much additional time would be needed.²⁴ She then informed you that she estimated that DPH would be able to provide the requested records on or before March 10, 2017, but would notify you if there were any changes to that date.²⁵ In response, you asked if there was an estimation of how much more time was needed.²⁶ She stated: “I was advised that approximately 3 weeks was needed for legal review, so March 10 is three weeks out.”²⁷

On March 10, 2017, DPH’s FOIA Coordinator denied your request on the basis that there was a pending criminal case against the dogs’ former owner and the health of the dogs is evidence in that criminal case.²⁸ She stated that disclosure of the information “would impede the enforcement of law and judicial process.”²⁹ DPH stated that the information is not a public record pursuant to 29 *Del. C.* §10002(l)(3), as it was part of an investigatory file compiled for civil or law-enforcement purposes.³⁰ DPH also stated that the information was also confidential pursuant to 29 *Del. C.* §10002(l)(3).³¹

On March 19, 2017, you asked DPH’s FOIA Coordinator “why it took DHSS almost 40 days to come to this conclusion.”³² Initially, she responded that DPH had provided a response on February 20th

²² Email from A. Wojcik to S. Marvel dated February 1, 2017 (4:37 PM).

²³ Email from A. Wojcik to S. Marvel dated February 20, 2017 (1:05 PM).

²⁴ *Id.*

²⁵ *Id.*

²⁶ Email from S. Marvel to A. Wojcik dated February 20, 2017 (1:08 PM).

²⁷ Email from A. Wojcik to S. Marvel dated February 20, 2017 (1:15 PM).

²⁸ Letter from A. Wojcik to S. Marvel dated March 10, 2017 at 2; Email from A. Wojcik to S. Marvel dated March 10, 2017 (12:33 PM).

²⁹ Letter from A. Wojcik to S. Marvel dated March 10, 2017 at 2; Email from A. Wojcik to S. Marvel dated March 10, 2017 (12:33 PM).

³⁰ Letter from A. Wojcik to S. Marvel dated March 10, 2017 at 2; Email from A. Wojcik to S. Marvel dated March 10, 2017 (12:33 PM).

³¹ Letter from A. Wojcik to S. Marvel dated March 10, 2017 at 2.

³² Email from S. Marvel to A. Wojcik dated March 19, 2017 (6:00 PM).

that additional time was needed for legal review and provided a good faith estimate of March 10th.³³ She stated that the response was provided on that date, which was 25 business days after the request.³⁴ She noted: “DPH has 10 FOIAs in process on any given day, over 300 in a year, and works to complete them in as expeditious a manner as possible given the volume of requests.”³⁵ You asked whether that meant that time was spent determining whether DHSS had a legal obligation to supply the information.³⁶ DPH’s FOIA Coordinator responded: “As your request involves an open case with pending court proceedings, a key part involved legal review to determine whether requested documents are considered public, or exempt, under the FOIA statute. Legal review is a common component of the FOIA process.”³⁷

SUMMARY OF THE ARGUMENTS

February 9, 2017 Petition

In your February 9, 2017 petition, you alleged that DPH violated FOIA because 1) it did not supply the requested records and 2) it did not indicate whether DPH requested BVSPCA to supply the requested records to DPH in response to your request. You also asserted that BVSPCA is a “public body” subject to FOIA because it receives public funds and was “appointed” by DHSS to handle animal sheltering. You included as an attachment a copy of the contract between DHSS and the Chester County SPCA and argued that the following provision contained therein proves that BVSPCA is subject to FOIA: “To the extent permissible under 29 Del. C. ‘ [sic] 10001, et. seq., the parties to this Agreement shall preserve in strict confidence any information, reports or documents obtained, assembled or prepared in connection with the performance of this Agreement.”

In its February 17, 2017 response, DPH argued that the locational records for the dogs are not in DPH’s possession and are not under its control.³⁸ DPH acknowledged that it has access to the number and destinations of all animals transferred monthly from BVSPCA to other animal welfare organizations or rescue groups, but stated that it does not obtain that information on a per-dog basis.³⁹ DPH argued that,

³³ Email from A. Wojcik to S. Marvel dated March 21, 2017 (1:13 PM).

³⁴ *Id.*

³⁵ *Id.*

³⁶ Email from S. Marvel to A. Wojcik dated March 21, 2017 (1:37 PM).

³⁷ Email from A. Wojcik to S. Marvel dated March 21, 2017 (1:49 PM).

³⁸ February 17, 2017 Response Letter at 4.

³⁹ *Id.* By way of example, DPH noted that, on February 14, 2017, a colleague of yours had requested information concerning the “number and destination of animals transferred out of shelter to other welfare or rescue groups” pursuant to BVSPCA’s contract with OAW. *Id.* at 3. DPH noted that, because its contract requires BVSPCA to provide OAW with monthly reports that include information that would be responsive to your colleague’s request, DPH requested the information from BVSPCA in order to respond

even if the requested records were under DPH's control – or that of another public body – the records would be exempted from FOIA's definition of "public record" pursuant to: 1) 29 *Del. C.* § 10002(l)(6), which exempts "[a]ny records specifically exempted from public disclosure by statute or common law," including the common law right of privacy,⁴⁰ and 2) 29 *Del. C.* §10002(l)(3), which exempts "investigatory files compiled for civil or criminal law-enforcement purposes." DPH also argued that BVSPCA is not a "public body" subject to FOIA.

In a section of your February 9, 2017 Petition entitled "Counterpoints to Potential Opposing Arguments," you attempted to address the DPH's legal position regarding whether the information itself is a "public record." Specifically, in response to DPH's argument regarding personal privacy,⁴¹ you stated that your "purpose is not to publish their names and addresses or any other information" but to "contact them to verify that the dog(s) are in their possession and alive."⁴² You also stated that the other person requesting the information was doing so for the purpose of giving those individuals and the agencies in control of the dogs money.⁴³ Finally, in response to DPH's argument that the information is exempt as part of an investigatory file pursuant to 29 *Del. C.* §10002(l)(6), you argued that "[p]roviding the press with this information would have no effect on the case against the dogs' former owner."

March 21, 2017 Petition

In your March 21, 2017 petition, you argued that DPH violated FOIA by: 1) denying your request and, 2) taking "almost 40 days" to do so. With respect to DPH's denial of your request, you argued that, because the defendant in the above-mentioned criminal case has a right to see the dogs' medical files, there is nothing currently pending and, as a result, the investigatory files exemption no longer applies.

to the February 14, 2017 request. *Id.* DPH noted that it would also provide the information to you upon receipt in attempt to fulfill part of your request. *Id.* On February 20, 2017, that individual contacted this office, noting that you had forwarded DPH's February 17 Response to him and stating that he did not understand how his February 14, 2017 FOIA request was relevant to this matter. He nevertheless stated that he would be submitting facts which he believed to be relevant to this matter. We received his response, dated February 21, 2017, on February 23, 2017. While I have considered the facts and arguments raised in his submission out of an abundance of caution, and over the objection of DPH, I have nonetheless determined that they are not dispositive to this determination. As such, I have not specifically incorporated them – or any supplemental correspondence regarding the submission – herein.

⁴⁰ Specifically, DPH argued that "[t]he individuals who have chosen to take the animals into their homes have a right to their privacy and the disclosure of their addresses is not mandated by FOIA." February 17 Response Letter at 5.

⁴¹ We note that you cited 29 *Del. C.* §10002(l)(1). However, that section is limited to "personnel, medical, or pupil" files. Based upon the record, it is my understanding that the privacy exemption cited by DPH is contained in 29 *Del. C.* §10002(l)(6), as noted below.

⁴² Petition.

⁴³ *Id.*

You also challenged DPH's representation that disclosure of the information would impede the enforcement of the law and the judicial process. With respect to your allegation regarding the timeliness of DPH's response, you acknowledged that DPH stated that it would require more than 15 days to respond, but alleged that the length of time between your request and DPH's response was "egregious." Finally, you renewed your argument that private agencies should be subject to FOIA, arguing that "if private agencies are contracted by the state to provide a state service, yet are not subject to FOIA laws, the critical system of checks and balances the U.S. uses to maintain democracy is being violated."

In its March 31 Response Letter, DPH argued that the medical records for the dogs at issue are investigative files pursuant to 29 *Del. C.* §10002(l)(3) and thus exempt from disclosure under FOIA.⁴⁴ DPH stated that the dogs are the subject of an ongoing criminal case, that their medical condition is a component of the criminal case.⁴⁵ With respect to your argument that the defendant's right to see the records removes the records from any applicable FOIA exemption, DPH argued: "Simply because the defense may have the right to see the evidence (a due process right of the defendant) does not mean that the public has the right to review and critique evidence before trial."⁴⁶ With respect to your argument regarding the timeliness of DPH's response, DPH argued that it fully complied with 29 *Del. C.* §10003(h)(1).⁴⁷ DPH argued that it cited a permissible reason for additional time, provided a good-faith estimate of the necessary timeline, and then provided a response within that timeline pursuant to 29 *Del. C.* §10003(h)(1).⁴⁸ DPH argued that, "[w]hile the Division [of Public Health] does not believe it is statutorily required to explain why extra time was needed for legal review, [DPH's FOIA Coordinator] did explain why legal review was needed in this case."⁴⁹ DPH noted that it sent its response within 25 business days of receipt of the request.⁵⁰ Finally, DPH argued:

To the extent that Ms. Marvel is questioning the need for legal review, whether legal review is necessary in response to a given FOIA request is a decision to be made between the relevant State agency and its legal counsel, not the requestor of the information. To the extent that Ms. Marvel is solely concerned about the time needed for legal review, that is also a decision to be made between the agency and its legal counsel, as long as it is in good faith.⁵¹

⁴⁴ March 31 Response Letter at 2.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 1.

⁵¹ *Id.* at 3.

Finally, in response to your argument that the time DPH required to respond to your request was egregious, DPH argued that “Delaware’s Freedom of Information Act does not differentiate between the press and other members of the public.”⁵²

RELEVANT STATUTES

Pursuant to 29 *Del. C.* §10003(a):

All public records shall be open to inspection and copying during regular business hours by the custodian of the records for the appropriate public body. Reasonable access to and reasonable facilities for copying of these records shall not be denied to any citizen.

FOIA also addresses public records that are not in the physical possession or custody of the public body but are controlled by the public body. Pursuant to 29 *Del. C.* §10003(j)(1):

If all or any portion of a FOIA requests seeks records controlled by the public body but are not within its possession or cannot otherwise be fulfilled by the public body with reasonable effort from the records it possesses, then the public body shall promptly request that the relevant custodian provide the noncustodial records to the public body.

FOIA defines a “public record” as “information of any kind, owned, made, used, retained, received, produced, drafted or otherwise compiled or collected, by any public body, relating in any way to public business or in any way of public interest, or in any way related to public purposes.”⁵³ However, certain information is exempt from this definition. For example, 29 *Del. C.* §10002(l)(3) exempts “[i]nvestigatory files compiled for civil or criminal law-enforcement purposes.” Similarly, 29 *Del. C.* §10002(l)(6) exempts “[a]ny records specifically exempted from public disclosure by statute or common law.”

FOIA defines a “public body” as:

any regulatory, administrative, advisory, executive, appointive or legislative body of the State, or of any political subdivision of the State, including, but not limited to, any board, bureau, commission, department, agency, committee, *ad hoc* committee, special committee, temporary committee, advisory board and committee, subcommittee, legislative committee, association, group, panel, council or any other entity or body established by an act of the General Assembly of the State, or established by any body established by the General Assembly of the State, or appointed by any body or public official of the State or otherwise empowered by any state governmental entity, which:

⁵² *Id.*

⁵³ 29 *Del. C.* §10002(l).

- (1) Is supported in whole or in part by any public funds; or
- (2) Expends or disburses any public funds, including grants, gifts or other similar disbursements and distributions; or
- (3) Is impliedly or specifically charged by any other public official, body, or agency to advise or to make reports, investigations or recommendations.⁵⁴

DISCUSSION

February 9, 2017 Petition

DPH Did Not Violate FOIA Because DPH Does Not Possess or Control the Requested Records

As noted above, in your February 9, 2017 petition, you argue that DPH violated FOIA by its “refusal” to request records from BVSPCA pertaining to the present location of the dogs seized by OAW in November of 2016. DPH has indicated that it retained control over those animals until December 8, 2016, at which point ownership was signed over to BVSPCA. You indicated that the purpose of your request was to determine if the dogs were still alive, or if they had been euthanized.

You requested “documents relating to the location of any of the dogs seized....Specifically, where each dog is located currently and whether or not they are alive...” When ownership of the dogs transferred to BVSPCA on December 8, 2016, DPH no longer had any custodial interest in the animals.⁵⁵ You allege that DPH should have requested that BVSPCA provide the records you sought, citing 29 *Del. C.* §10003(j)(1). However, DPH maintains that it does not “control” any records in BVSPCA’s possession. Once the dogs were forfeited to BVSPCA, BVSPCA became the entity responsible for making and keeping records of their current location. Our office has previously addressed the issue of records in the

⁵⁴ 29 *Del. C.* §10002(h).

⁵⁵ The terms of the contract attached to the February 9, 2017 petition state: “Services – the following services will commence on January 1, 2016...the housing and care of animals which are the subject of certain animal cruelty investigations...until such time as the legal proceeding is ended or the court overseeing the case orders the animal forfeited to the shelter, the owner’s rights are forfeited. The boarding and care costs are to be billed to the animal owner upon impoundment and every 30 days thereafter until the disposition of the animal is determined...If the owner does not submit payment to the vendor within 30 days of receiving the invoice, they forfeit ownership of the animal. If such forfeiture occurs, the State’s responsibility for the animal ends on the effective day of forfeiture and the contractor will be free to adopt, transfer or euthanize animal as appropriate in accordance with the law.” It seems that the contract itself contemplates that the State forfeits an interest in animals that are impounded once they are forfeited to BVSPCA.

custody of a third party in a contractual relationship with a public body.⁵⁶ The determinative points in such an analysis are whether or not the public body has “constructive possession” or “administrative control” over the records.⁵⁷

In this case, DPH has stated conclusively that it does not have possession or control over the information you seek, which I understand to be the current location and situation of the dogs, because the information pertains to animals that are no longer in the custody of DPH. There is no reason that DPH would have access to or control of any records kept by BVSPCA about animals that are under the sole custody and care of BVSPCA.⁵⁸

BVSPCA is Not a Public Body Subject to FOIA

You also alleged in your petition that BVSPCA is subject to FOIA because it was “appointed” by a state agency and receives public funds. While not relevant to our determination of whether DPH violated FOIA, the parties have submitted argument regarding the extent to which BVSPCA is independently subject to FOIA. For the reasons stated below, I conclude that BVSPCA is not a “public body.” As a result, it has no independent obligation to comply with FOIA.

BVSPCA is not a public body by virtue of its receipt of public funds, nor was it “appointed” by any state body; it is a private, non-profit entity that contracts with the state for sheltering services.⁵⁹ Any records kept by BVSPCA are not, by definition, public records. As this Office stated in *Del. Op. Att’y Gen.* 15-IB04, “three factors must be considered in order to determine whether an entity is a ‘public body’ within the meaning of FOIA”:

⁵⁶ See *Del. Op. Att’y Gen.* 06-IB17 (2006), 2006 WL 2630107, *supra*. (Records subject to FOIA where held by a private custodian where the public body acknowledged that it had access to the records and where the records were maintained to help carry out the public body’s statutory duties). See also *Del. Op. Att’y Gen.* 14-IB02 (records in the possession of a private entity were not public records because they were not prepared to carry out the public body’s responsibilities, the public body did not monitor the entity’s performance, and the public body did not have access to the records).

⁵⁷ *Del. Op. Att’y Gen.* 17-IB01 (records of settlement agreement reached on behalf of a public body were “public records” within the meaning of FOIA even though they were not in the possession of the public body because the public body failed to demonstrate that it did not have constructive possession or administrative control over the records).

⁵⁸ Lack of physical possession or custody of the records is not dispositive. See, *e.g.*, *Del. Op. Att’y Gen.* 07-IB05, 2007 WL 4732788, at *3: “[w]e believe that the Courts in Delaware would agree that when a public body has constructive possession or administrative control of records in the possession of an accountant or attorney or other private agent, those records are public records for purposes of FOIA and the public body must arrange to make those records available for inspection and copying upon request.” The right of access to the records is dispositive.

⁵⁹ It is also worth noting that if BVSPCA *were* a public body, any request for records within the possession and control of BVSPCA should be made to that entity, not to DPH.

First, the entity must be a “regulatory, administrative, advisory, executive, appointive or legislative body of the State, or of any political subdivision of the State.” Second, the entity must be (i) established by an act of the General Assembly of the State, or (ii) established by any body established by the General Assembly of the State, or (iii) appointed by any body or public official of the State, or (iv) otherwise empowered by any state governmental entity. Third, the entity must (i) be supported in whole or in part by any public funds; or (ii) expend or disburse public funds; or (iii) be charged (either implicitly or specifically) by a public official, body, or agency to advise or to make reports, investigations or recommendations.⁶⁰

BVSPCA is not a “regulatory, administrative, advisory, executive, appointive or legislative body.” It was not established by an act of the General Assembly or appointed by any State actor; nor does the contract with the state necessarily “empower” BVSPCA to act in any law enforcement or other capacity. BVSPCA simply shelters animals that are impounded by OAW and DPH. It is not disputed that BVSPCA receives public funds in return for this service. However, an entity’s receipt of public funds does not automatically transform that entity into a “public body.” The statute’s requirements are not read separately, but in conjunction with each other. If receiving public funds were sufficient for a determination of an entity’s status as a public body, there would be no need for the statute to first require, for example, that an entity be “established by an act of the General Assembly.”⁶¹

Because the records subject to your request are in BVSPCA’s possession and are not under the control of DPH, I conclude that DPH did not violate FOIA in connection with your request. Pursuant to 29 *Del. C.* §10003(j), a public body does have an obligation to request non-custodial records that are within its control. However, FOIA does not obligate a public body to request records that it does not control.⁶² In this case the records in question are under control of BVSPCA because, as of December 8, 2016, the animals that are the subject of said records were forfeited to BVSPCA. The fact that BVSPCA contracts with DPH and may have in its possession some records which are subject to disclosure under FOIA does not axiomatically mean that all records maintained by BVSPCA are public records.

March 21, 2017 Petition

The records that you requested on February 1, 2017 are investigatory files and, as a result, are exempt from FOIA. Indeed, the Delaware Superior Court has made clear that the exemption applies as early as the first correspondence that led to the investigation and survives even after the investigation is

⁶⁰ 2015 WL 4850416, at *2 (July 31, 2015) (citing 29 *Del. C.* §10002(h)).

⁶¹ 29 *Del. C.* §10002(h).

⁶² We note that in response to your initial request, DPH contacted BVSPCA and confirmed that the dogs were all alive, and placed in various homes and shelters, or with rescue organizations for rehabilitation. Following the response from DPH, you were contacted directly by BVSPCA, at the request of DPH, and BVSPCA confirmed that the dogs were alive and provided you with a record of the general outcome for each particular animal.

completed.⁶³ This is so even if the criminal defendant is entitled to access this information in connection with his criminal case. While it is not clear to us that the defendant would be entitled to the records you seek,⁶⁴ it is important to note that a litigant's access to information through the discovery process does not render that information a "public record" subject to disclosure to the general public pursuant to FOIA.⁶⁵

Finally, I conclude that DPH did not violate FOIA when it provided you with a good-faith estimate of the time necessary for legal review of your request and subsequently provided you with a response within that timeframe.⁶⁶ While I recognize that you believe the additional time for legal review to have been "egregious," I see no evidence that DPH's invocation of the need for additional time for legal review was improper, nor do I see evidence of bad faith in DPH's estimate of how much additional time was needed.

⁶³ See *News-Journal Co. v. Billingley*, 1980 WL 3043, at *2-3 (Del. Ch. Nov. 20, 1980).

⁶⁴ *Del. Op. Att'y Gen.* 10-IB13, 2010 WL 4154565, at *3 (Oct. 8, 2010) ("The Delaware Rules of Criminal Procedure, Rule 16 specifically governs the materials contained within a criminal file that are to be disclosed to a criminal defendant. It is noteworthy that the criminal procedural rule does not call upon the state to disclose to the defendant the entire content of the criminal file, but rather only those portions necessary to comport with due process.").

⁶⁵ See, e.g., *Williams v. Alexander*, 1999 WL 743082, at *2 (Del. Super. June 29, 1999) (ordering disclosure of records in a civil case "subject to a protective order to prevent information from disseminating beyond the necessary personnel involved in th[e] case").

⁶⁶ See 29 *Del. C.* §10003(h)(1) ("If access cannot be provided within 15 business days, the public body shall cite 1 of the reasons hereunder why more time is needed and provide a good-faith estimate of how much additional time is required to fulfill the request."). As explained in two recent opinions from this office, this Office does not condone the failure of public bodies to respond appropriately to a FOIA request on a timely basis. See *Del. Op. Att'y Gen.* 16-IB15 (June 10, 2016) and *Del. Op. Att'y Gen.* 16-IB12 (June 8, 2016). These two cases are distinguishable, however, because DPH did meet the statutory requirement of providing both a reason for the delay and a good faith estimate of the timeframe within which they would provide a response. In any case, the remediation would be to order a response from DPH or to order that the requested records be provided,. DPH has provided a response, and since I have determined that the records in question are exempt from disclosure, such remediation would not be appropriate.

CONCLUSION

For the reasons set forth above, it is our determination that DPH did not violate FOIA as alleged in the petitions.

Very truly yours,

A handwritten signature in cursive script, reading "LaKresha S. Roberts". The signature is written in black ink and is positioned above the printed name and title.

LaKresha S. Roberts
Chief Deputy Attorney General

cc: Joanna S. Suder, Deputy Attorney General (via email)
Zoe Plerhoples, Deputy Attorney General (via email)
Michelle E. Whalen, Deputy Attorney General (via email)